Marine Officers Association, Teamsters Union Local No. 54[1] ***and*** **Riverway Co.** Case 14-CC-1421

March 31, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On June 18, 1981, Administrative Law Judge Abraham Frank issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief as did the Charging Party.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

For either a 6- or 9-year period prior to June 30, 1977, Riverway Co., the Employer and Charging Party, and Marine Officers Association, Teamsters Union Local No. 54, the Respondent Union, were parties to collective-bargaining agreements. In April and May 1977, the parties met to negotiate changes in the then existing contract. The representatives of the Employer balked at the Union's demands and stated the Company's intent to look into other means of performing the work. Pursuant to this intent, the Employer chartered out its boats without crews. The boats were then chartered back to the Employer with full crews. The last of the boats was chartered out and rechartered to the Employer in December 1977. The crews were unrepresented by a labor organization.

In November 1979, union representatives met with members of the Employer's management. At that time they expressed a desire to represent the Employer's pilothouse personnel. The Union was told that the Employer no longer retained any employees on its boats. Thereafter, on April 18, 1980, the Union picketed one of the boats which was pulling a line of the Employer's barges. A similar incident occurred on April 20, 1980.

The Administrative Law Judge found that the 1977 labor dispute between the Union and the Employer continued to exist and was unresolved at the time that the Union picketed the Employer and that the Union had not acquiesced to the Employer's change in method of operation. He found that as of April 18 and 20, 1980, the Employer continued to perform essentially the same business services for its customers that it had historically performed pursuant to a collective-bargaining agreement with the Union that had expired in 1977. The Administrative Law Judge, in recommending that the complaint be dismissed, determined that the Union could lawfully seek to regain the work formerly performed by its members.

The record evidence reveals that the Employer involved herein chartered out all of its motor vessels in April to June 1977. The collective-bargaining agreement between the Union and the Employer expired on June 30, 1977.[2] At the time that the Employer chartered out its vessels, the Union apparently engaged in a form of limited protest. There was sparse evidence as to the nature or duration of the protest. For a period of close to 3 years thereafter the Union was silent. It was only in the latter stages of 1979 followed by the picketing of April 1980 that the Union confronted the Employer concerning the earlier change.

As stated previously, the Administrative Law Judge determined that the Union never acquiesced to the Employer's change and that a labor dispute between the parties still existed. We cannot agree. The Union had full knowledge of the Employer's change at the time that it was implemented. The Union, by sitting on its rights for almost 3 years after the complained-of conduct, must be deemed to have acquiesced to the Employer's change in operations. There comes a point in time when the allegedly wronged party must either protest the alleged wrong or be deemed to consent to the wrong.[3] The Union can no longer claim that its picketing had a work-preservation objective. Having acquiesced to the Employer's changes of 1977, the Union no longer had a labor dispute with the Employer. Absent a continuing dispute with the Employer over the loss of unit work, the Union's dispute, if any, lies with the employers who control the nonunion personnel on the motor vessels—Conti-Carriers and Terminals, Inc., C & G Operating Co., and Republic Marine. As such, the Union, by engaging in picketing of the Employer's

[1] The name of the Union appears as amended at the hearing.

[2] In both the official transcript and its brief, the Employer maintains that the contract contained a clause allowing it to charter its vessels. Neither the alleged clause nor the contract was introduced into evidence or marked for identification purposes at the hearing. However, we note that the clause was set out in an earlier Board Decision involving this same Employer and tangentially this same Union. *Upper Mississippi Towing Corporation, et al.*, 246 NLRB 262, 267 (1979). While we take administrative notice of the clause as set out in the Board's earlier Decision, we see no need to reach the merits of the Employer's argument in light of our decision herein.

[3] We express no view as to the specific point in time when the Union would be deemed to have acquiesced to the Employer's change in operations. As is often the case, parties are given a "reasonable" amount of time to assert their rights. The Union's delay in the present situation was unreasonable.

barges on April 18 and 20, 1981, violated Section 8(b)(4)(ii)(B) of the Act, since its object was to force or require the Employer to cease doing business with the employers who control the personnel on the motor vessels.

CONCLUSIONS OF LAW

1. Riverway Co. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Marine Officers Association, Teamsters Union Local No. 54, is a labor organization within the meaning of Section 2(5) of the Act.
3. By picketing on April 18, 1980, and again on April 20, 1980, the barges and boats of Riverway Co., Marine Officers Association, Teamsters Union Local No. 54, violated Section 8(b)(4)(ii)(B) of the Act.
4. The aforesaid violations of the Act are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Marine Officers Association, Teamsters Union Local No. 54, has engaged in and is engaging in unfair labor practices in violation of Section 8(b)(4)(ii)(B) of the Act, we shall order that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Marine Officers Association, Teamsters Union Local No. 54, its officers, agents, and representatives, shall:

1. Cease and desist from threatening, coercing, or restraining Riverway Co., or any other person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force or require Riverway Co., or any such other person, to cease using, selling, handling, transporting, or otherwise dealing in the products of, or to cease doing business with, Conti-Carriers and Terminals, Inc., C & G Operating Co., and Republic Marine.
2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Post at its business offices and meeting halls copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and mail sufficient copies of said notice to the Regional Director for Region 14 for posting by Riverway Co., Conti-Carriers and Terminals, Inc., C & G Operating Co., and Republic Marine at all locations where notices to their employees are customarily posted, if the companies are willing to do so.

(c) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

MEMBER FANNING, dissenting:

I am persuaded by the Administrative Law Judge that there is no supportable basis for finding a violation in this case. Accordingly, like him, I would dismiss the complaint in its entirety for the same reasons advanced by him.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

To all members of Marine Officers Association, Teamsters Union Local No. 54

To employees of Riverway Co., Conti-Carriers and Terminals, Inc., C & G Operating Co., and Republic Marine

After a hearing at which all sides had the opportunity to present their evidence, the National Labor Relations Board has found that we violated the law and has ordered us to post this notice; we intend to carry out the Order of the Board and abide by the following:

> WE WILL NOT threaten, coerce, or restrain Riverway Co., or any other person engaged in commerce or in an industry affecting commerce, where in either case an object of such conduct is to force or require Riverway Co., or any such other person, to cease using, selling, handling, transporting, or otherwise dealing in the products of, or to cease doing busi-

[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ness with Conti-Carriers and Terminals, Inc., C & G Operating Co., or Republic Marine.

MARINE OFFICERS ASSOCIATION, TEAMSTERS UNION LOCAL NO. 54

DECISION

ABRAHAM FRANK, Administrative Law Judge: The original charge in this case was filed on April 21, 1980, and the complaint alleging violations of Section 8(b)(4)(ii)(B) of the Act, issued on May 7, 1980. The hearing was held on June 12, 1980, at St. Louis, Missouri. All briefs filed have been considered.

At issue in this case is the question whether Respondent engaged in secondary picketing of barges owned by the Charging Party.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. PRELIMINARY FINDINGS AND CONCLUSIONS

The Charging Party, Riverway Co., hereinafter Riverway, a Minnesota corporation, previously known as Upper Mississippi Towing Corporation (UMTC), with its main office in Minneapolis, Minnesota, is engaged in the business of providing barge transportation of commodities for customers in interstate commerce. C & G Operating Co. (C & G) and Conti-Carriers and Terminals, Inc. (Conti), are engaged in the barge transportation business, including the operation of towboats. Each of these companies derives revenue from the transportation of goods in interstate commerce in the amount of $50,000 annually. I find that each company is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent, Marine Officers Association, Teamsters Local No. 54, hereinafter MOA, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE FACTS

A. *Background*

For a 6- or 9-year period prior to June 30, 1977, the Charging Party, under the name of UMTC, and MOA were parties to collective-bargaining agreements. Except for the last few months of that period, UMTC was engaged not only in the business of transporting goods by barge, but also in the business of operating towboats for that purpose. In connection with the latter activity, the agreement between UMTC and MOA covered basically the pilothouse personnel, including masters, mates, pilots, and engineers and mates in the engine room.

On April 8, 1976, MOA filed a petition to represent the nonsupervisory personnel on UMTC towboats. On December 23, 1976, MOA requested leave of the Board's Regional Director to withdraw its petition. The request was approved on January 5, 1977.[1]

In April or May, 1977, UMTC and MOA met for the purpose of negotiating changes in the existing contract. V. Lee McMahon, an attorney, represented UMTC. McMahon testified that, after receiving MOA's demands, he told the union negotiators he was shocked and said, "Now, we're going to have our next meeting next Tuesday. I don't ask for an answer today but when you come back next Tuesday, I want to know if you're serious about these demands because if you are, I want to tell you over the weekend and until we meet with you, we are going to spend our time looking into other means of getting this work done. We're going to be looking at the costs."

At the next meeting, Captain Jackson, speaking for MOA, informed McMahon that the Union was firm. McMahon said that the Company would be actively engaged in finding some other way of operating before the current contract expired.

Beginning approximately in May 1977, UMTC "bareboat" chartered out all of its motor vessels. A bareboat charter, as distinguished from a "fully found charter," delivers to the charterer a boat without personnel for the use of the charterer under specified terms and conditions.

During the latter part of May 1977, UMTC bareboat chartered the vessels *Steve T.* and *Gale C.* to C & G. During the first part of June 1977, UMTC bareboat chartered the vessels *Harriet Ann* and *Henry G.* to Jemco Towing. In May or June 1977, UMTC bareboat chartered the *Evey T.* to River City Towing.

On December 12, 1977, Riverway bareboat chartered the *Laura Lee* to C & G. The charter of the *Laura Lee*, in evidence, is typical of all other charters of towboats by Riverway or UMTC to the above various companies. The term of the charter is for 1 year, renewable thereafter from month to month and may be canceled by either party upon 30 days' written notice.

On the same date, C & G rechartered the *Laura Lee* to Riverway in a "Fully Found Time Charter." Under this charter, C & G agreed to let and time charter the towboat to Riverway on a "fully found" basis, i.e., with all personnel, including the captain, officers, and crew of the tugboat. The recharter from C & G to Riverway, like the charter from Riverway to C & G, is for a term of 1 year, renewable thereafter from month to month, cancellable by either party upon 30 days' written notice. Under the terms of the recharter, all of the employees on the tugboat are employees of C & G, and C & G is an independent contractor. Riverway agreed to pay C & G for its services in manning and operating the tugboat the sum of $1,950 per day.

All of the towboats bareboat chartered by UMTC or Riverway to the above various companies were rechartered by Riverway from such companies on a fully found time basis. The above Fully Found Time Charter from C & G to Riverway, in evidence, is typical of all other fully found time charters.

McMahon did not clearly recall whether members of MOA engaged in picketing at the time UMTC changed its method of operations. However, he did recall that in the area below Cape Giradeau, Missouri, and Cairo there was some type of resistance by MOA members either

[1] There is no evidence that MOA at any time thereafter sought to represent these employees, contrary to the suggestion in the General Counsel's brief.

contemporaneous with or as a result of UMTC's changeover in operations.

In November 1979, McMahon met with Robert Younge, president of MOA, and Joseph Marello, secretary-treasurer. Younge and Marello told McMahon that they wanted to represent the pilothouse people in Riverway's boats, the people they had always represented. They wanted Riverway to voluntarily recognize their Union. They were getting a lot of pressure from their membership and were going to have to do something about it. McMahon told the union officials that Riverway had no personnel, that it had bareboat chartered out all of its motor vessels.

B. *Riverway's Current Business Operations*

In June 1977, Riverway owned 390 barges. At the time of the hearing Riverway owned about 439 barges. Since June 1977, Riverway has been in the barge business, but does not operate the towboats that haul its barges. However, Riverway continues to own the towboats chartered to the above various companies and rechartered fully found to Riverway since it does not itself employ personnel to operate towboats.

Riverway solicits business from customers desiring to move bulk commodities by barge. Riverway charges its customers a fee for the use of its barges plus a fee for the cost of transportation. The daily cost of the boats rechartered to Riverway fully found remains the same whether the rechartered boats push one barge or ten or a hundred. Having contracted to move certain cargo at a price, Riverway arranges for the actual transportation by contacting either a boat owned by Riverway and rechartered to Riverway fully found or a boat of another company unrelated by charter to Riverway. In dispatching a boat to move one or more barges, Riverway's dispatching department determines which boat is closest and can be utilized at the best and most convenient price.

C. *The Picketing*

During times material herein the *Sam B. Thomas*, a line boat towing barges up and down the river, was chartered on a fully found basis from Republic Marine Company to Conti for a 2-year period, beginning in October 1979. The crew operating the *Sam B. Thomas* are not represented by any union and are not employees of Conti. Conti, however, pursuant to its contract right under its charter with Republic Marine Company, dispatches the *Sam B. Thomas* to perform towing jobs at the direction of Conti. To maximize its revenue, Conti attempts to arrange for a complete tow of barges whenever possible. On occasion, Conti will tow barges for Riverway and other barge companies.

Riverway Harbor Service of St. Louis, Inc. (Riverway Harbor), is engaged in the business of "fleeting" barges, and for that purpose operates five harbor tugs. The term "fleeting" refers to the practice of collecting and storing barges of various companies for purposes of redistribution. In collecting and storing barges or allocating them in tows for movement within the St. Louis Harbor or to points up the Missouri, Illinois, or upper Mississippi Rivers, Riverway Harbor leases about 11 fleeting areas in the St. Louis harbor.

Riverway Harbor's name was changed from Universal Towing Company about the same time in 1977 that Riverway changed its name from UMTC. Riverway owns 80 percent of the stock of Riverway Harbor. Ervin Carlson, president of Riverway, is on the board of directors of Riverway Harbor. Tom Grupp, treasurer and a member of the board of directors of Riverway Harbor, is a financial officer of Riverway.

On April 16, 1980, acting on a report that the *Steve T.* was going to be picketed in the St. Louis harbor, Donald S. Bruner, president of Riverway Harbor, called the union hall and spoke to Younge. Younge told Bruner that the Union was going to picket all of UMTC's boats. Bruner said he thought the dispute had been settled several years ago in court. Younge said it had not been settled as far as MOA was concerned, that they still had a strike sanction going. Bruner reminded Younge that Riverway Harbor had a contract with MOA and that Younge would be affecting the jobs of MOA members by picketing Riverway Harbor's fleeting areas. Younge said he would stay away from Riverway Harbor Service's fleets; that he knew MOA had a contract with Riverway Harbor and it would be illegal to do any picketing that would harm Riverway Harbor's employees.

On April 18, 1980, informed that a boat was picketing Riverway Harbor's fleet, Bruner visited the site in his Company's speedboat. He observed that the *Sam B. Thomas*, with a line of barges in tow, was entering a fleet of Riverway Harbor. The picketboat was about 25 to 50 yards off the side of the tow. The picketboat would go to the upper end of the tow and turn around and return, moving back and forth along the side of the tow. Younge was on the picketboat. Bruner asked Younge what he was doing. Younge said he was picketing the barges. Bruner said, "You know you can't get near to my fleet." Younge replied, "Well, we're not in your fleet." Bruner said that was a matter of opinion, but Younge was awful close to Bruner's fleets. At the time of the picketing the *Sam B. Thomas* had Riverway barges in its tow.

The picket boat carried the following sign:

MARINE OFFICERS ASSOCIATION, LOCAL NO. 54

Has a labor dispute with Riverway, formerly Upper Miss. Corp. We have no dispute with and are making no appeals to any other employer or employees.

TEAMSTERS LOCAL UNION NO. 54 affiliated with I.B. of T.C.W. & H. of A.

On Sunday, April 20, the *Laura Lee* with Riverway barges in tow was backing into a Riverway Harbor fleet. On this occasion the MOA picketboat with the same sign moved back and forth alongside the tow of barges. The crew of the *Laura Lee* are not represented by a labor organization.

Bruner observed the same type of picketing by MOA on several subsequent occasions. However, on all of the

occasions when Bruner witnessed picketing by MOA, the towboats had Riverway barges in tow, which were being moved either up or down the river or into or out of the Riverway Harbor's fleets. Bruner observed no picketing of Riverway barges when they were tied off in Riverway Harbor's fleets.

As a result of the picketing, a pilot employed part time by Riverway Harbor, but regularly employed as an airline pilot, quit his employment with Riverway Harbor. No other employee of Riverway Harbor ceased work.

The General Counsel and Respondent stipulated that there was a labor dispute between the Charging Party and Respondent on or about June 30, 1977, and there was no resolution to that dispute.

ANALYSIS AND FINAL CONCLUSIONS OF LAW

It is an unfair labor practice under Section 8(b)(4)(ii)(B) of the Act for a labor organization to "threaten coerce, or restrain any person engaged in commerce . . . where an object thereof is . . . forcing or requiring any person . . . to cease doing business with any other person . . . ." This clause, however, may not be construed to make unlawful, "where not otherwise unlawful, any primary strike or primary picketing."

Under the above clause, a union lawfully may take action to regulate the relations between an employer and his own employees for the purpose of preserving unit work for his employees, provided the union's conduct is not tactically calculated to satisfy union objectives elsewhere, *National Woodwork Manufacturers Association, et al.* v. *N.L.R.B.*, 386 U.S. 612, 644 (1967); and provided further, that the employer against whom such action is taken has itself the power to satisfy the union's demand without involving neutral employers for objectives proscribed under subsection (B) above. *N.L.R.B.* v. *Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine & General Pipefitters of New York and Vicinity, Local Union No. 638 [The Austin Company, Inc.]*, 429 U.S. 507 (1977).

The primary nature of a union's effort to preserve unit work in the manner set forth in *National Woodwork, supra*, and its obligation to refrain from pressuring employers without the right to control such work as in *Enterprise Association, supra*, are distinguishable from those situations in which an employer, confronted with a primary strike or primary picketing, subcontracts the work in dispute to an otherwise independent contractor. In such cases the latter employer, having involved itself in the labor dispute with the primary employer, is not protected by the provisions of Section 8(b)(4)(B), but is an ally of the primary employer and the union may lawfully seek to regain or obtain the work theretofore performed by the employees it represented. *Macmillan Science Co., Inc.*, 231 NLRB 1332 (1977); *Kable Printing Company*, 225 NLRB 1253 (1976); *Thermo-Craft Press, Inc.*, 233 NLRB 6 (1977).

It is the position of the General Counsel that the Union had no labor dispute with Riverway at the time of the picketing, that the Union's dispute was with the operators of the nonunion crews of the towboats over which Riverway had no control. I find no merit in this argumemt. The evidence shows and the General Counsel stipulated at the hearing that a labor dispute existed between the Union and Riverway (UMTC) in June 1977 and that it had not been resolved. It is of no consequence that the contract between the Union and UMTC terminated in June 1977. The labor dispute was not thereby mooted. "Labor relations are a continuum and the parties are entitled to any legal protection which may have arisen under the contract." *United Marine Division Local 333 (MOTC Acquisition Corp.)*, 226 NLRB 1214, 1215, fn. 5 (1976).

In 1977, in reply to the Union's demand for new contract terms, which UMTC considered excessive, UMTC announced that it was "actively engaged in finding some other way of operating before the current contract expired." Thereafter, UMTC or Riverway bareboat chartered out all of its towboats and rechartered them fully found as a means of continuing its business without employees of its own and without the necessity to accept the Union's terms for a new contract. Although the Union at that time engaged in some form of protest as a result of Riverway's change in operations, the record is not clear as to the nature of that protest. There is no evidence, however, that the Union at any time acquiesced in the Company's change in operations, which resulted in the loss of jobs for its members and loss of representation rights. In November 1979, the Union informed counsel for Riverway that the Union wanted to represent the people it had always represented as it was getting pressure from its membership and would have to do something about it. Riverway's response was that it had no personnel of its own.

Riverway continues to perform precisely the same business services for its customers that it has historically performed under contracts with MOA as the collective-bargaining representative of its employees. It bills customers for the use of its barges and the cost of transporting bulk commodities by towboats. It is the owner of the towboats it operated as part of its barge and transportation business, including the towboat operated by C & G for the use of Riverway. Its bareboat and fully found charters with respect to its own towboats may be terminated upon 30 days' written notice. Riverway Harbor, Conti, Republic Marine, and C & G are engaged in fleeting and towing activities clearly related to, and an integral part of, the normal, day-to-day business of Riverway. In these circumstances, picketing of Riverway barges is not unlawful even though it may affect the employees of Riverway Harbor, Republic Marine, and C & G, and the business activities of Conti. *Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO [General Electric Company]* v. *N.L.R.B.*, 366 U.S. 667 (1961); *United Steelworkers of America, AFL-CIO [Carrier Corporation]* v. *N.L.R.B.*, 376 U.S. 492 (1964); *Oil, Chemical & Atomic Workers International Union and its Local 4-449, AFL-CIO (Anchortank, Inc.)*, 238 NLRB 290 (1978). Moreover, in view of its unresolved dispute with Riverway, MOA may lawfully seek to regain the work formerly performed by its members. The fact that Riverway has contracted out this work to ostensibly independent contractors does not compel a

different result. *Thermo-Craft Press, supra*, and cases cited above.

I find also that Respondent's picketing was directed only at Riverway and conforms to the criteria for lawful primary picketing at a common situs set forth in *Lodge 68 of the International Association of Machinists (Moore Drydock Company)*, 81 NLRB 1108 (1949).

Accordingly, I conclude that Respondent has not violated Section 8(b)(4)(ii)(B) by its picketing activities, directed at Riverway, as alleged in the complaint, and I shall recommend that the complaint be dismissed in its entirety.

[Recommended Order for dismissal omitted from publication.]